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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

CALifornians for Renewable Energy, a California non-profit public benefit corporation representing California consumers, and its counsel, Stephan C. Volker.

v.
Plaintiffs,

California Public Utilities Commission,

Defendant.

Civ. No. C08-01954-JL

**PLAINTIFFS' REQUEST TO
VACATE HEARING ON
DEFENDANTS' MOTION TO
DISMISS AS MOOTED BY
FIRST AMENDED COMPLAINT**

AND

SUPPORTING DECLARATION OF COUNSEL

Hearing: August 13, 2008

Time: 9:30 a.m.

Judge: Hon. James J. Larson,
Magistrate-Judge

INTRODUCTION

Defendant California Public Utilities Commission (“ CPUC” or “ defendant”) has filed a motion to dismiss. Plaintiffs CALifornians for Renewable Energy and Stephan C. Volker (collectively “ CARE” or “ plaintiffs”) have filed a First Amended Complaint in response to the arguments contained in defendant’ s motion. The amendments directly address defendant’ s arguments. Therefore, in the interest of judicial economy plaintiffs ask this Court to remove defendant’ s motion to dismiss

1 from the Court's calendar as moot and vacate the hearing currently calendared
 2 thereon for August 13, 2008 at 9:30 a.m.

3 **ARGUMENT**

4 Plaintiffs filed their First Amended Complaint in accordance with Rule
 5 15(a)(1)(A) of the Federal Rules of Civil Procedure, which provides that "[a] party may
 6 amend its pleading once as a matter of course [] before being served with a responsive
 7 pleading." FRCP 15(a)(1)(A). The Ninth Circuit Court of Appeals has repeatedly held
 8 that "[a] motion to dismiss is not a 'responsive pleading' within the meaning of Rule
 9 15," and thus plaintiffs need not seek leave of Court to amend prior to the filing of an
 10 answer. *Crum v. Circus Circus Enterprises*, 231 F.3d 1129, 1130 (9th Cir. 2000), citing
 11 *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d
 12 764, 788 (9th Cir. 2000); *Miles v. Department of Army*, 881 F.2d 777, 781 (9th Cir.
 13 1989) (providing for an amendment to the complaint to add the Secretary of the Army as
 14 a defendant after the filing of a motion to dismiss). Thus, plaintiffs amended the
 15 complaint "as a matter of course." FRCP15(a)(1)(A).

16 According to black letter law, plaintiffs' First Amended Complaint "supersedes
 17 the original" complaint, and thereafter the original complaint is "treated [] as non-
 18 existent." *Bullen v. De Bretteville*, 239 F.2d 824, 833 (9th Cir. 1956), citing 71 C.J.S.,
 19 Pleading, 321; *Armstrong v. Davis*, 275 F.3d 849, 878 (9th Cir. 2001) ("[A]n amended
 20 pleading supersedes the original"). Because defendant's motion addresses the
 21 allegations contained in the original complaint, which is now "non-existent," it is moot
 22 and should not be considered by the Court. See, e.g., The Rutter Group, *California*
 23 *Practice Guide: Federal Civil Procedure Before Trial*, section 9:262, p. 9-87 (2008).

24 Furthermore, the First Amended Complaint addresses all of the arguments for
 25 dismissal in defendant's motion. First, plaintiffs have added all of the Commissioners
 26 that made the decisions at stake in this litigation as defendants. This amendment
 27 addresses the sovereign immunity defense raised in defendant's motion.

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1 Second, plaintiffs elaborate on the Commission’s lack of adequate notice to
2 plaintiffs as the gravamen of their claims for relief. Defendant’s Johnson Act defense,
3 which requires proof that the Commission’s challenged orders were adequately noticed
4 (28 U.S.C. § 1342(3))), therefore must await adjudication until the merits stage of this
5 case. Moreover where, as here, arguments in a motion to dismiss are inextricably bound
6 to the merits of the case, the Court should defer adjudication of the matter until the
7 merits stage of the proceeding. *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir.
8 1987). Because the notice issue in defendant’s Johnson Act argument and the notice
9 issues raised in plaintiffs’ complaint are inextricably bound together, this Court should
10 not address the issue until it is briefed based on the superseding allegations of the First
11 Amended Complaint. *Id.*

12 Third, defendant's claims of res judicata and collateral estoppel are likewise
13 moot. Plaintiffs have amended the complaint to negate these claims, explaining that
14 their state court case related only to statutory interpretation of state laws, not to
15 constitutional issues, and that their state case did not adjudicate plaintiffs' constitutional
16 rights. These amendments undercut defendants' res judicata and collateral estoppel
17 arguments.

CONCLUSION

19 For these reasons, the First Amended Complaint addresses all of the defenses
20 raised by defendant. Accordingly, on July 16, 2008, plaintiffs' counsel asked
21 defendant to withdraw its motion in light of the amended complaint. *See*, attached
22 Declaration of Counsel. Defendant has not yet responded. *Id.*

As contemplated in the Federal Rules of Civil Procedure, defendant normally would be required to respond to plaintiffs' amended complaint "within 10 days after the service of the amended pleading." FRCP 15(a)(3). However, because plaintiffs have joined new defendants to the case, including five sitting Commissioners (and one prior Commissioner) on the defendant Commission, plaintiffs offer to stipulate with

1 defendant to allow defendant(s) more time to file an joint answer or amended motion
2 to dismiss.

3 Dated: July 16, 2008

Respectfully submitted,

4 LAW OFFICES OF STEPHAN C. VOLKER

5 By: /s/ Stephan C. Volker

6 STEPHAN C. VOLKER
Attorneys for Plaintiffs

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8 **SUPPORTING DECLARATION OF COUNSEL**

9 I, STEPHAN C. VOLKER, hereby declare as follows:

10 1. I am counsel for plaintiffs and have personal knowledge of the following
11 matters.

12 2. I emailed and telephoned counsel for the California Public Utilities
13 Commission, Darwin Farrar, on July 16, 2008 to ask him to discuss the withdrawal as
14 moot of defendant's motion to dismiss.

15 3. Mr. Farrar was not in when I called, so I left him a message to call me to
16 discuss how he wished to proceed. As of the filing of this Request, I have not heard
17 back from Mr. Farrar.

18 I declare under penalty of perjury that the foregoing is true and correct of my
19 personal knowledge, and that this declaration was executed in Oakland, California on
20 July 16, 2008.

21 /s/ Stephan C. Volker
22 STEPHAN C. VOLKER

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